IN THE
MISSOURI SUPREME COURT

No. SC 84538

STATE OF MISSOURI,

Respondent,

vs.

KAREL M. SAMMONS,

Appellant.

Appeal from the Circuit Court of Marion County, Mo.
10th Judicial Circuit, Division I
The Honorable Robert M. Clayton, II, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for two counts of the Class B felony of delivery or sale of a controlled substance, § 195.211 RSMo Cum. Supp. 1998, obtained in the Circuit Court of Marion County, Missouri, for which appellant was sentenced to two fifteen-year terms of imprisonment to be served consecutively in the Missouri Department of Corrections. The appeal does not involve any of the categories reserved for the exclusive jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction originally rested on the Missouri Court of Appeals, Eastern District. Article V, § 3, Missouri Constitution (as amended 1982). In an opinion filed May 28, 2002, the Eastern District transferred this case to this Court. Therefore, jurisdiction properly rests with this Court under Supreme Court Rules 30.27 and 83.02.

STATEMENT OF FACTS

Karel M. Sammons, hereinafter "appellant," was charged as a prior offender by amended information on November 14, 2000, in the Circuit Court of Marion County, Missouri, with one count of the Class A felony of distribution, delivery, or sale of a controlled substance near schools and the Class B felony of distribution, delivery, or sale of a controlled substance (L.F. 9-10, 38).[1] The case proceeded to trial on November 16, 2000, the Honorable Robert M. Clayton, II, presiding.

Appellant contests the sufficiency of the evidence to sustain his conviction on Count II. Viewed in the light most favorable to the verdicts, the following evidence was adduced at trial:

On December 6, 1999, Craig Haley informed Investigating Agent Michael Beilsmith of the Northeast Missouri Task Force that he had made contact with appellant, whom he knew then only as "Red," and advised him that he could buy crack cocaine from appellant (Tr. 126, 193). Haley had been working as a confidential informant with the Task Force in exchange for

[1] Because there was no evidence presented at trial that appellant knew he was delivering a controlled substance within 2000 feet of a school, the jury was instructed on both counts as Class B felonies (Tr. 257).

possible leniency on a charge of delivery of a controlled substance (Tr. 125, 150).

Agent Beilsmith and Haley then arranged a "buy" from appellant (Tr. 127). Beilsmith and Haley met at a confidential location and Beilsmith searched Haley for drugs, money, and weapons (Tr. 127-28). They got into Beilsmith's car and Haley used Beilsmith's cellular phone to call appellant to set up a "buy" (Tr. 129, 196). Appellant told Haley to meet him at Steve Blackburn's house (Tr. 132, 197). Beilsmith then gave Haley fifty dollars of pre-recorded buy money that had been photocopied earlier in the investigation and placed a body wire on him (Tr. 130). Beilsmith dropped Haley off in the parking lot across from the American Legion bowling alley on Sixth Street in Hannibal (Tr. 132).

Haley then went to the front of Blackburn's residence and knocked on the door (Tr. 133). At this time, Special Agent Patti Talbert was recording the transaction from another vehicle (Tr. 181). Appellant was already at Blackburn's house when Haley arrived (Tr. 200). Haley told appellant he wanted to buy a $50 piece of crack and paid appellant with the pre-recorded drug buy money (Tr. 130, 206). Appellant told Haley he would be back in five minutes and left the house (Tr. 207). Beilsmith, from his car, saw appellant leave Blackburn's house (Tr. 142). Appellant returned a short time later (Tr. 142, 207). Appellant cut a $50 piece and gave it to Haley (Tr. 208). Haley then asked appellant if he could buy a 1/16 ounce or an 8 ball and appellant told him he could "handle it" (Tr. 209). Haley told appellant he would call him later that evening and left (Tr. 209).

Haley walked directly back to where Beilsmith was waiting (Tr. 136, 210). Haley gave Beilsmith a plastic wrapped package of material later identified as crack cocaine (Tr. 136, 137,

159, 235). Beilsmith then searched Haley for contraband, money, and weapons and found nothing (Tr. 138). Haley no longer had the money given to him to purchase the drugs from appellant (Tr. 138).

That evening, following the same procedure, Beilsmith again dropped Haley off behind the same residence (Tr. 140-42). Beilsmith again searched Haley for contraband (Tr. 140, 209). Beilsmith gave Haley one hundred dollars of pre-recorded buy money (Tr. 141). This time, Sergeant Douglas Rader was with Agent Talbert running the recording system (Tr. 168). Haley went inside Blackburn's house, and Beilsmith once again saw appellant leave the house (Tr. 143, 161). Beilsmith never saw appellant return (Tr. 143). Approximately one hour and ten minutes later, Haley came back to Beilsmith's location without any drugs, and Beilsmith searched him again (Tr. 143, 213). This time, Beilsmith did not find the hundred dollars in cash he had given to Haley, nor did he find any contraband of any kind (Tr. 143, 213).

The next day, Haley viewed a photographic lineup and identified appellant's photograph as the individual who had sold him the cocaine on both occasions (Tr. 146, 229).

At trial, Beilsmith; Sergeant Douglas Rader; Special Agent Patti Talbert; Haley; Lieutenant Joe Hunold, the officer from the Hannibal Police Department who was working as the evidence technician the night the evidence was turned in to the police by Beilsmith; and Josh Robertson, the criminalist from the Missouri State Highway Patrol who identified the substance purchased by Haley as cocaine base, all testified for the State (Tr. 124, 167, 180, 192, 231, 233). The Defense called Haley, Rader, and Beilsmith to testify (Tr. 240, 248, 251). Appellant did not testify.

At the close of the State's evidence and again at the close of all evidence, appellant moved for a judgment of acquittal (L.F. 238, 256). The court overruled the motions (Tr. 238, 256). The jury found appellant guilty of both counts (L.F. 285-86). The court sentenced appellant to two terms of fifteen years of imprisonment to be served consecutively in the Missouri Department of Corrections (Tr. 296; L.F. 91). Appellant filed his notice of appeal on December 28, 2000 (L.F. 93). This appeal follows.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR BY OVERRULING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL, GIVING INSTRUCTION NUMBER 8, AND SENTENCING APPELLANT ON COUNT II, DELIVERY OF A CONTROLLED SUBSTANCE, BECAUSE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION IN THAT REASONABLE JURORS COULD HAVE FOUND FROM THE EVIDENCE PRESENTED THAT APPELLANT OFFERED TO SELL CRACK COCAINE TO POLICE INFORMANT CRAIG HALEY.

Appellant contends that the trial court erred in overruling appellant's motions for judgment of acquittal, giving Instruction 8, and sentencing appellant upon his conviction of selling a controlled substance (App.Sub.Br. 12). He claims that the State did not prove that appellant "knowingly sold" crack cocaine to confidential informant Craig Haley (App.Sub.Br. 12).

A. The Evidence

After purchasing $50 worth of cocaine base from appellant, confidential informant Craig Haley arranged to purchase a "1/16" or "8 ball" of cocaine base from appellant (Tr. 140). Following the procedure used during the first purchase, Officer Beilsmith dropped Haley off behind the Blackburn residence (Tr. 140-42). Prior to dropping him off, Beilsmith searched Haley for contraband (Tr. 140, 209). Beilsmith gave Haley one hundred dollars of pre-recorded buy money to make the purchase from appellant (Tr. 141). Haley went inside Blackburn's

house and told appellant that he "wanted the sixteenth" and gave appellant $100 (Tr. 213). Then, as before, appellant left the house, ostensibly to obtain the drugs (Tr. 143, 161, 213). This time, however, appellant did not return with the crack cocaine (Tr. 143, 213).

Approximately one hour and ten minutes later, Haley left Blackburn's residence and returned to Beilsmith's location, and Beilsmith searched him again (Tr. 143, 213). This time, Beilsmith did not find the hundred dollars in cash he had given to Haley, nor did he find any contraband of any kind (Tr. 143, 213).

B. Standard of Review

In determining the sufficiency of the evidence, a reviewing court accepts as true all the evidence favorable to the State, including all favorable inferences drawn from the evidence, and disregards all contrary evidence and inferences. **State v. Silvey**, 894 S.W.2d 662, 673 (Mo.banc 1995); **State v. Grim**, 854 S.W.2d 403, 405 (Mo.banc 1993), cert denied 510 U.S. 997, 114 S.Ct. 562, 126 L.Ed.2d 462 (1993). An appellate court neither weighs the evidence, **State v. Villa-Perez**, 835 S.W.2d 897, 900 (Mo.banc 1992), nor determines the reliability or credibility of the witnesses. **State v. Marlow**, 888 S.W.2d 417, 421 (Mo.App., W.D. 1994).

C. The Evidence was Sufficient to Prove a Sale

In challenging the sufficiency of the evidence, appellant asserts that a "sale" of a controlled substance "must be more than words exchanged," and that "there must be some proof that the seller had the ability" to deliver the controlled substance, and that the seller intended to complete the contemplated transfer of the controlled substance (App.Br. 15). Contrary to appellant's assertions, however, such additional elements are not required under

the applicable statutes.

Appellant was charged with violating § 195.211, RSMo Cum. Supp. 1998, which prohibits the distribution, delivery, manufacture or production or the attempted distribution, delivery, manufacture or production of a controlled substance or possession of a controlled substance with the intent to distribute, deliver, manufacture, or produce. Section 195.010(8) defines "deliver" or "delivery," in relevant part, as the "actual constructive, or attempted transfer from one person to another. . . of a controlled substance . . . and includes a sale." Section 195.010(36) defines "sale," in relevant part, to include "barter, exchange, or gift, or **offer therefor**" (*emphasis added*).

Accordingly, the jury was given the following verdict director:

> As to Count II, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about December 6, 1999, in the Township of Mason, County of Marion, State of Missouri, the defendant knowingly sold cocaine, a controlled substance, to CI 287, and
>
> Second, that defendant knew that the substance he sold was cocaine, a controlled substance, then you will find the defendant guilty under Count II of selling a controlled substance.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

> Sale includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.

(L.F. 72).

In this context, a "sale" does not require proof of a defendant's ability or intent to immediately complete the transaction. "It is not necessary that the elements of a commercial sale, i.e., fixed price, delivery, and payment, be present in order to constitute a sale." **State v. Crumbaker**, 753 S.W.2d 76, 78 (Mo.App., E.D. 1988); **State v. Tierney**, 584 S.W.2d 618, 623 (Mo.App., W.D. 1979). The word "'sale'. . . shall be given an application unconfined by definitions of the civil practice on commerce and contracts." **Tierney**, 584 S.W.2d at 623.

Under the plain language of the relevant statutes, a sale is complete as soon as an offer is made. It is absolutely irrelevant that a controlled substance was neither present during negotiations nor transferred from one party to the other. And in the present case, the evidence presented at trial was sufficient to sustain appellant's conviction: appellant offered to sell Haley the crack cocaine; Haley accepted the offer; and Haley gave appellant money in payment for the drugs upon appellant's promise that he would go get the drugs as he had done with the previous sale of crack cocaine. The sale was complete as soon as the offer was made.[2] As

[2] Appellant asserts that "the common usage of 'offer' requires that the person making the offer have whatever it is he is offering to the seller" (App.Sub.Br. 27). In fact, the common usage of the word is much broader. People often offer to sell goods they have not yet obtained,

such, appellant's conviction for "sale" of a controlled substance was supported by sufficient evidence, notwithstanding the fact that appellant never actually had the drugs on his person during the negotiations or actually transferred the drugs to Haley.[3]

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but intend to obtain.

[3] Appellant cites **State v. Starr**, 664 P.2d 893 (Mont.App, 1983) and **Shanks v. Commonwealth**, 463 S.W.2d 312 (Ken.App., 1971), in support of his claim that the defendant must have the present ability to transfer what is, in fact, a controlled substance. These cases involved the situation where the defendant was offering to sell a substance that appeared to be a controlled substance, but the defendant was aware that the substance was not what it purported

to be. In the present case, the jury specifically found that appellant knew the substance he was offering to transfer was cocaine base. Furthermore, Missouri statutes clearly contemplate criminal punishment in situations where a defendant sells a substance which is not a controlled substance, but appears to be. §§ 195.010(8) and 195.010(21), RSMo 2000.

Appellant contends that this allows him to be convicted on the basis of "words alone" (App.Sub.Br. 27). However, appellant is incorrect. This Court considered a similar question, although in a slightly different posture, in **State v. Roberts**, 779 S.W.2d 576 (Mo.banc 1989). Roberts argued that a statute that allowed a conviction for prostitution when a person "engages or offers or agrees to engage in sexual conduct with another person in return for something of value" was unconstitutional if the evidence at trial consisted of "mere spoken words." Id. at 578. In affirming Roberts' conviction, this Court held that the statute at issue "made illegal not only the physical sexual act(s) but also the negotiations that assure the seller of the economic return expected for the performance of the physical act(s)." Id. at 579. Similarly, here, this Court should affirm appellant's conviction as § 195.211 makes illegal not only the actual physical transfer of a controlled substance but also "the negotiations that assure the seller of the economic return expected" for the transfer of the controlled substance.

Other state courts have found that a mere offer to transfer a controlled substance constitutes a sale under similar statutory language. For example, in **Francis v. State**, 890 S.W.2d 510 (Tex.App., 1994), the Texas Court of Appeals upheld the defendant's conviction for delivery of a controlled substance. In **Francis**, the defendant asked two undercover officers what they were looking for and they asked for "two, $20 pieces of crack cocaine, two 20 rocks." Id. at 511. The defendant indicated that he did not have what they were looking for, but that he knew where they could get some. Id. Appellant then told the officers that if they would drive him to a different location, he would get some for him. Id. The officers agreed. Id. As the two officers and the defendant approached the officer's van, the defendant grabbed

onto the sliding door of the van, opened it, and exposed the surveillance team. Id. The defendant was then arrested and charged with delivery of a controlled substance. Id. at 512. On appeal, the defendant argued that the evidence was insufficient to support his conviction. Id. The Texas Court of Appeals upheld appellant's conviction and held as follows:

> When delivery is by actual or constructive transfer, the substance must be proved to be a controlled substance. *Stewart v. State, 718 S.W.2d at 288.* However, when delivery is by an offer to sell, no transfer of a controlled substance need even take place. Id. As the court noted in Stewart, "when the prosecution involves delivery 'by offer to sell' that element can be met by the representation, by word or deed, that the person has a controlled substance to sell." *Id. at 289.* Therefore, neither the fact that appellant possessed a controlled substance at the time of delivery, nor the fact that he did not actually or constructively transfer a controlled substance cannot preclude a finding of delivery by an offer to sell. All that need be found is that an offer was made by either words or deed which would indicate appellant intended to sell a controlled substance.

Id. at 513. *See also* **Jiminez v. State**, 838 S.W.2d 661 (Tex.App., 1992)(the offense is complete when by words or deed, a person knowingly or intentionally offers to sell what he states is a controlled substance).

Likewise, in **State v. Brown**, 253 N.E.2d 478 (Ill.App., 1969), the Illinois Court of Appeals upheld a defendant's conviction for unlawful sale of a narcotic drug. In **Brown**, the

evidence was that a police informant told the defendant that he wanted two bags of heroin, to which the defendant replied "follow me." The informant then gave the ten dollars to the defendant, and another individual gave the informant two tinfoil packages containing heroin. The court upheld the defendant's conviction on the grounds that Illinois' Uniform Narcotic Drug Act, like §195.010(36), RSMo 2000, includes making an offer of sale. Specifically, the court held as follows:

> [A] mere gift, a simple offer or agreement to sell, or the delivery to one who has agreed to purchase, constitutes a sale of narcotics, notwithstanding the fact that no consideration is paid, or that the sale is not fully complete by payment of the agreed price.

Id. at 232.

Additionally, contrary to appellant's assertion, it was not "words alone" that established his guilt in the present case. The negotiations for the transfer of the controlled substance were sufficient evidence of his intent to complete the sale of a controlled substance. As the verdict director reveals, the jury found that appellant knowingly offered to sell a controlled substance and that he knew that the substance was cocaine. Thus, even if the State were required to show a specific intent to complete the contemplated transaction, the jury clearly determined that appellant had the requisite criminal intent because implicit in appellant's offer was an intent and purpose to obtain and transfer the drugs.[4]

[4] It was the lack of this type of intent that led to reversal in **People v. Jackson**, 381

Appellant counters this argument, and cites various cases which have reached a similar conclusion, by claiming that this allows him to be convicted when his only intent was to steal the buyer's money. However, while appellant is free to suggest that defense to the jury, it does not change the fact that his offer (though fraudulent) constituted a "sale" under the applicable statutes.

D. Summary

The statutory language defining the offense of sale of a controlled substance is plain on its face – "sale" includes a mere offer to sell a substance that the defendant knows is a controlled substance. The jury found that appellant knowingly sold crack cocaine and that he knew that the substance he sold was cocaine, a controlled substance. As such, the evidence was sufficient for the jury to convict appellant of sale of a controlled substance.

Therefore, for the reasons set out above, the trial court did not err in overruling appellant's motion for judgment of acquittal at the close of the evidence, giving Instruction 8, or in sentencing appellant on Count II. Appellant's argument is without merit and, therefore,

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P.2d 1 (Cal.banc 1963), **People v. Braithwaite**, 617 N.Y.S.2d 284 (N.Y. 1994), **State v. Werner**, 657 P.2d 1136, 1139 (Kan.App., 1983), and **State v. Alvarado**, 875 P.2d 198 (Ariz.App, 1994), which are cited by appellant in his brief.

should fail.

CONCLUSION

In light of the foregoing, respondent respectfully requests that appellant's conviction and sentence be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,500 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 14th day of August, 2002, to:

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